Statutory Accident Benefits in the Post-LAT World

By: Jennifer Bezaire & Jaclyn Habas

The world of statutory accident benefits changed dramatically on April 1, 2016 when the Licence Appeal Tribunal ("LAT") took over adjudication of disputes from the Financial Services Commission ("FSCO"). The LAT was a relatively unknown tribunal at the time and there existed much uncertainty surrounding what the transition would mean for stakeholders.

We now have 2.5 years of experience with the LAT. Unfortunately, this experience has not been overly positive. While prior case law appears to have been followed for the most part, the LAT has presented many challenges and obstacles for our clients and seems very much stacked against them. This paper will discuss the state of accident benefits in the post-LAT world. It will also outline strategies to cope with this new world and increase our client's chances of accessing much needed SABs.

Updated Statistics

As of September 9, 2018, there were approximately 606 published LAT decisions on CanLII. My associate, Jaclyn Habas, kindly updated some of the statistics published in Duncan Macgillivray's Fall 2017 Conference paper titled "*Theatre of War: Where Is The LAT Now*?"[1]. Her review of the cases revealed the following:

- 532 cases were first level decisions;
- 74 cases were adjudicated by the Executive Chair, Linda Lamoreaux;
- Most of the cases have been heard in writing (a whopping 401!);
- 114 of the cases related to issues pertaining to the Minor Injury Guideline; and
- There are only 10 catastrophic impairment decisions.[2] The LAT has still not addressed the June 2016 CAT definition. It remains to be seen how the LAT will treat same.

[1] Duncan Macgillivray, "Theatre of War: Where Is The LAT Now?" (Paper delivered at OTLA 2017 Fall Conference) [unpublished].

[2] *16-001305 v Gore Mutual Insurance Company*, 2017 CanLII 44026; *16-002000 v Jevco Insurance Company*, 2017 CanLII 63617; *16-002234 v Unica Insurance Inc*, 2017 CanLII 93459; *16-003415/AABS v Allstate Insurance Company of Canada*, 2018 CanLII 8071; *16-001226 v State Farm Mutual Automobile Insurance Company*, 2018 CanLII 13155; *16-003891 v Primmum Insurance Company*, 2017 CanLII 77396; *16-00004 v Wawanesa Mutual Insurance Company*, 2017 CanLII 62155; *17-002561/AABS v TTC Insurance Company Limited*, 2018 CanLII 8101; *16-000013 v Peel Mutual Insurance Company*, 2017 CanLII 33649; *16-000145 v Intact Insurance Company*, 2017 CanLII 9823.

The Bad

The concerns and difficulties with the LAT are significant and far outweigh any positives that have come about as a result of its new mandate. The "bad" includes:

1. No meaningful ability to recover costs;
2. Increased limits on insurer production requirements;
3. No access to the courts; and
4. Lack of full case citations to enable case law searches.

(1) No meaningful ability to recover costs

While the general rule in litigation is that costs follow the event, this is not the case with the LAT. Costs are strictly prohibited except in very limited circumstances. This creates an access to justice barrier that many cannot overcome and further compounds the David and Goliath situation in which our clients find themselves.

The unavailability of costs is contrary to the recommendations of Justice Cunningham following his 2013 review of the dispute resolution system.[3] His Honour specifically recommended that the system be cost-efficient and reflect the economic imbalance between injured applicants and insurance companies. His Honour also recommended that the cost structure discourage abuse. In discussing the imbalance, Justice Cunningham noted:

> …there is a significant imbalance in terms of the resources and familiarity with the system between claimants and insurer. It has been pointed out to me that in the early days of no-fault insurance, when a benefit denial was disputed, benefits would continue to be paid in certain circumstances pending the resolution of the dispute. Those provisions were removed from the SABs long ago. If disincentives are needed, they should be directed at those who abuse the system rather than affecting the majority of claimants.[4]

Justice Cunningham further noted that while there was much disagreement amongst the stakeholders with respect to the issue of costs, there was seeming consensus that the system should be cost-efficient and that graduated fees (based on how far the dispute advanced through the system) would be both fair and reasonable.

In contrast to the recommendations of stakeholders and Justice Cunningham, the former liberal government essentially eliminated costs from the system. Per Rule 19 of the Common Rules of Practice and Procedure (the "Rules"), costs are only payable if a party has acted "unreasonably,

[3] Ontario Automobile Insurance Dispute Resolution System Review Final Report, February 2014, ["Cunningham Report"].
[4] *Ibid* at p 19.

frivolously, vexatiously, or in bad faith *during the proceeding*."[5] The LAT interprets "proceeding" to commence on the date of the application to dispute. Any unreasonable, frivolous, vexatious, or bad faith conduct *prior* to the commencement of the application is not relevant for the purposes of a cost award. As Adjudicator Treksler and Sewrattan held in *16-000041/AABS v. Intact Insurance Company,* "the actions and/or behavior of a party that occurred *prior to* the filing of an application to the Tribunal cannot be considered under Rule 19.1."[6]

In the very few cases where costs have been awarded, the amount awarded is also restricted such that it in no way reflects the economic realities of bringing an application to the LAT. Per Rule 19(6), costs awarded are limited to $1000 for each full day of attendance at a motion, case conference or hearing.[7] There is no provision commenting on the LAT's ability to award disbursements.

Of the 606 published decisions, there are only 6 cases in which costs have been awarded. Two of these cases were however overturned on Reconsideration, leaving only four successful cost awards. The quantum of costs awarded in these cases was exceedingly low, ranging between $250.00 and $700.00 (yes, this is not a typo!). In *17-003732 v. Royal Sun Alliance,* Adjudicator Hines made clear that "costs at the LAT are not meant to be punitive and punish the unsuccessful party in a dispute."[8]

The cases in which costs have been successfully awarded include the following:

a. ***16-001649 v. Aviva General Insurance Company***[9]: Adjudicator Bickley awarded costs in the amount of $700.00 when the Applicant failed to attend the hearing and despite knowing the Applicant would not be attending, counsel for the Applicant did not provide the Respondent or tribunal with advance notice. The adjudicator ordered costs payable to the Respondent because the Applicant's lack of communication was unreasonable in the circumstances and counsel for the Applicant acted in bad faith in failing to notify the parties of the non-attendance. Although the Respondent sought $9,331.49 in expert costs, legal fees, and disbursements, only $700 was awarded. The Adjudicator held that satisfying the Rule 19 entitlement to costs, "[does not entitle] a party to an award of costs on a full, partial or substantial indemnity scale."[10]

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[5] Safety, Licensing Appeals & Standards Tribunals Ontario, "Common Rules of Practice & Procedure" R 19.1, http://www.slasto.gov.on.ca/en/Documents/What%20New-EN/LAT%2c%20ACRB%2c%20FSC%20Common%20Rules%20of%20Practice%20and%20Procedure.pdf, ("SLATSO Website"), ("*Rules*").
[6] *16-000041/AABS v Intact Insurance Company,* 2016 CanLII 78333 at para 4 of Analysis.
[7] *Rules* at R 19.6.
[8] *17-003732 v Royal and Sun Alliance,* 2018 CanLII 39449 at para 62.
[9] *16-001649 v Aviva General Insurance Co,* 2017 CanLII 69276.
[10] *Ibid* at para 31.

b. ***17-000043 v. Unifund Assurance Company***[11]: Adjudicator Truong awarded $500.00 in costs when the Applicant withdrew her application and within hours of withdrawal, re-submitted the exact same application. The tribunal stated that since nothing had changed between the two applications, the re-application amounted to an abuse of process. Although the Respondent requested $5,000.00 in costs, Adjudicator Truong only awarded 10% of the requested amount indicating that "an award of costs is not meant to be an assessment of the actual costs a party has had to incur as a result of defending a claim." [12]

c. ***17-002535/AABS v. Aviva Insurance Canada***[13]: Adjudicator Go awarded $300 in costs when the Respondent violated the tribunal's Order without explanation. Despite the Case Conference Order that no additional documents were to be filed, the Insurer served surveillance conducted thereafter and sought to rely on same. Adjudicator Go refused to allow the surveillance into evidence and held that costs were appropriate in the circumstances indicating that the "Respondent should not be allowed to benefit from the fruits of its behavior."[14]

d. ***17-004982/AABS v. Certas Home and Auto Insurance Company***[15]: Adjudicator Bass awarded $250.00 in costs because the Applicant failed to attend a teleconference motion without notice. The Applicant made the parties wait 41 minutes on the call before advising the tribunal the Applicant would not be attending. Counsel for the Applicant claimed he had previously notified the tribunal and Respondent by email, but failed to produce evidence of same.

In the additional two decisions which were overturned on Reconsideration, the adjudicators awarded only $250 in costs. The Executive Chair overturned the cost awards because the parties settled their disputes prior to the tribunal issuing its decisions.[16]

When the LAT first began handling SABs disputes, it was unclear if the payment of disbursements would be treated similarly to legal fees. Many argued that disbursements should still be paid and were successful in obtaining payment on settlement. This changed with the release of the decision in *17-002122 v. Respondent* where Adjudicator Gottfried made clear that "the tribunal does not issue rulings for the payment of expenses that are in the nature of disbursements."[17]

The unavailability of costs creates an incredibly uneven playing field. There are no longer any disincentives to prevent insurer abuse of the system. Insurers now have free reign to treat claimants

[11] *17-000043 v Unifund Assurance Co*, 2017 CanLII 35317.
[12] *Ibid* at para 13.
[13] *17-002535/AABS v Aviva Insurance Canada*, 2018 CanLII 8076.
[14] *Ibid* at para 21.
[15] *17-004982/AABS v Certas Home and Auto Insurance Company*, 2018 CanLII 13154.
[16] *16-000433/AABS v Wawanesa Mutual Insurance Company*, 2017 CanLII 19201.
[17] *17-002122 v Respondent*, 2018 CanLII 39458 at para 48.

in an arbitrary manner prior to an application for dispute. They can arbitrarily deny benefits, put the claimant through expensive medical assessments, and hire lawyers to delay and deny access to benefits during the claim process, with little to no consequence. The only real recourse claimants have is to file an application at the LAT, but in order to do so they must fund it themselves. They must also somehow scrounge up the money to afford their own medical reports and assessments to substantiate their claims. While insurers have the means to do this, most claimants do not. As a result, they often end up paying their costs out of the benefits they recover, meaning that even if they win at arbitration, they lose.

The difficulties of claimants, particularly those with serious injuries, funding LAT disputes was discussed in *17-000638 v. Nordique Insurance.*[18] The Applicant filed a motion for legal fees, costs, and disbursements that included the costs of catastrophic assessment reports. The Applicant argued that because of his severe injuries and the application for catastrophic designation, he was unable to work and thus fund the high cost of reports. In refusing the Applicant's request for costs, Adjudicator Paluch held it matters not that the Applicant cannot afford the process:

> As much as I am sympathetic to the applicant's difficulties to fund this proceeding or that he cannot work and this has caused him financial hardship, this is not a consideration for me to award costs. Moreover, parties are free to negotiate costs and disbursements between themselves as they settle files.[19]

Although costs are no longer available under the legislation, arbitrators still comment that parties may negotiate costs and disbursements as between themselves on settlement of their disputes.[20] The reality though is that because of the LAT's restrictive rulings on costs, most if not all insurers take the position that costs and disbursements are not payable, leaving no meaningful ability to recover same.

(2) Increased limits on insurer production requirements

At FSCO, draft reports, communications between an assessment company and the assessor, communications between the adjuster and the assessment company and/or the assessor, and adjuster log notes up until the application for mediation were typically considered relevant productions.[21] As noted by Arbitrator Bujold in *Ghaedsharagy v. Kingsway General Insurance Co.*,

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[18] *17-000638 v Nordique Insurance,* 2017 CanLII 76922.
[19] *Ibid* at para 21.
[20] See *16-003039/AABS v Aviva Insurance,* 2017 CanLII 76929; *17-000638 v Nordique Insurance,* 2017 CanLII 76922; *16-003039 v Aviva Insurance,* 2017 CanLII 99135; *16-000041 v Intact Insurance,* 2016 CanLII 60729; *16-003555 v Travellers Insurance Company,* 2017 CanLII 39739; *16-000075 v Wawanesa Mutual Insurance Company,* 2017 CanLII 35323.
[21] *Grette v Union Canadienne Cie d'Assurances,* 2008 CarswellOnt 4640 (FSCO Arb); *Campeau v Liberty Mutual Insurance Co,* 2001 CarswellOnt 5132 (FSCO Arb).

> The overwhelming practice has been to treat the insurers file as generally producible, at least to the date of the Application for Mediation (when arbitrators have generally recognized a "bright line" or presumption of litigation privilege), even where there has been no claim for a special award or the claim lacks particulars. Insurers today routinely produce their adjuster's files on such basis, and in most cases, this practice has provided and efficient and effective means of balancing full and fair disclosure of a class of relevant documents, on the one hand, against the need to protect documents prepared for the dominant purpose of litigation, on the other.[22]

Rule 9.1 of the Rules permit the LAT to order, at any stage of the proceeding, production of material that is arguably *relevant* to the issues in dispute.[23] In *17-001476/AABS v Unifund Assurance Company,* Vice-Chair White discussed the prior FSCO jurisprudence on this issue and held that the FSCO decision in *Campeau v. Liberty Mutual Insurance Co.* which supported production of log notes is not binding on the LAT.[24] However and despite same, Vice-Chair White held that the notes were producible in this case. The Vice-Chair stated:

> The mandate of the Tribunal includes the aspect of proportionality, meaning that we must consider the mechanisms we apply to a proceeding to ensure responsible and fair attention to issues. This notion of proportionality can also be applied here, when determining relevance. The adjuster's log notes are primarily for internal communications, however are not secret documents. It is difficult to argue against the relevance of log notes arising from the consideration of the circumstances of the accident and the impairments of the insured in the determination of entitlement to benefits. I understand that the respondent is also allowed to redact parts of the notes that would be privileged to the insurer. When balanced with the request from a minor child who is catastrophically injured for clarity of process, I consider the request is proportionally fair in that the disclosure is deemed relevant to the proceedings.[25]

Subsequent to the above-noted decision, Executive Chair Lamoureux held differently on reconsideration of a separate case, *N.Y. v. TD Insurance Meloche Monnex.*[26] In this case, the Respondent produced addendum medical reports after the Case Conference and after the Applicant filed her own evidence and submissions. In response, the Applicant requested disclosure of the adjuster's log notes and draft reports. The Tribunal denied production on the basis that same was

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[22] *Ghaedsharagy v Kingsway General Insurance Co,* 2008 CarswellOnt 1028 at para 26, (FSCO Arb) [*Ghaedsharagy*].
[23] *Rules* at R 9.1.
[24] *17-001476/AABS v Unifund Assurance Company,* 2017 CanLII 59494 at para 23 [*17-001476*].
[25] *Ibid* at para 26.
[26] *NY v TD Insurance Meloche Monnex,* 2017 CanLII 69446.

not relevant to the dispute, indicating: "I fail to see how adjuster notes and draft reports are relevant to the issue and would assist the applicant in satisfying [the NEB] test."[27]

The Applicant applied for reconsideration and attempted to explain the relevance by highlighting that at the Case Conference, the Applicant had indicated she would be making a claim that "the Insurer's conduct had been unreasonable". The Executive Chair noted however that the Applicant did not amend her application to indicate that she was seeking a special award and as a result, the Executive Chair held that there was no ground to interfere with the Tribunal's decision. The log notes were not producible.

N.Y. v. TD Insurance Meloche Monnex is hopefully just a one-off decision, but it does raise concern for our client's ability to obtain the adjuster log notes. As noted by FSCO Arbitrator Bujold in *Ghaedsharagy v. Kingsway General Insurance Co.,* and LAT Vice-Chair White in *17-001476/AABS v Unifund Assurance Company*, log notes are on their face relevant.[28] They reveal the basis for the claims handling and decision-making of the insurer. Without production of the notes, our clients will not have a full understanding of how the insurer came to its decision, thereby tying their hands at arbitration.

(3) No access to the courts

The new section 280(3) of the *Insurance Act* removed claimant access to the courts for all SABs disputes. It states:

> No person may bring a proceeding in any court with respect to a dispute described in subsection (1), other than an appeal from a decision of the Licence Appeal Tribunal or an application for judicial review.[29]

This amendment has been constitutionally challenged, without success by lawyer Joseph Campisi. [30] Mr. Campisi argued that s. 280(3) is discriminatory on the basis of disability and violated ss. 15(1) and (7) of the Charter. This challenge was unfortunately ill-constituted in that the Mr. Campisi did not have standing to bring this issue forward. Justice Belobaba held that Mr. Campisi did not have any real issue at stake or genuine interest in the constitutional validity; he was not involved in an automobile accident and did not have a personal claim arising out of same.

The Court did, however, go on to address the constitutional validity of the restriction on court proceedings and held that same did not violate the Charter. There exists no distinction on the basis of disability and "the case law is clear that neither a statutory limitation on tort damages nor the

[27] *Ibid* at para 16.
[28] *Ghaedsharag supra* note 22, *17-001476 supra* note 24.
[29] *Insurance Act,* RSO 1990, c I 8 at s 280(3).
[30] *Campisi v Ontario,* 2017 ONSC 2884, 279 ACWS (3d) 733.

elimination of a court option deprives an accident victim of his or her right to life, liberty, or security of the person."[31]

In *Stegenga v. Economical Insurance Company,* Ms. Stenega attempted to circumvent s. 280 of the *Insurance Act* by initiating an action against Economical for damages for mental distress and aggravated and punitive damages on account of bad faith, negligence and fraud.[32] Economical brought a Rule 21 motion and argued that s. 280 prevented Ms. Stenega from bringing her action in court. The court agreed and dismissed the case. The dispute in question was about a denial of accident benefits. Bad faith arising from such a denial falls within s. 280 and is thus restricted by same to proceedings before the Licence Appeal Tribunal.

As a result and whether we like it or not, the LAT appears to have the monopoly on SABs disputes. The only access claimants now have to the courts is through judicial review by the Divisional Court. Rule 18.1 of the Rules permits reconsideration by the Executive Chair within 21 days of the date of the decision.[33] Section 11(1) of the *Licence Appeal Tribunal Act, 1999,* S.O. 1999, c. 12, Sch. G ("the Act") provides that the Divisional Court may hear appeals from decisions relating to matters under the *Insurance Act* on questions of law that are brought within 30 days of the order appealed.[34] Reconsideration is not an absolute prerequisite to judicial review.[35]

Unless the LAT makes an error in law, its decision is final or at least subject only to reconsideration by the Executive Chair. This is unfortunate given many of the benefits superior court actions had for claimants in the past, particularly with respect to examinations for discovery and punitive damages.

(4) Lack of full case citation to enable case law searches

One of the other issues with the LAT is its case citations. The full name of the applicant is not included except in exceptional circumstances. Most citations include only numbers and the name of the insurer. According to the SLATSO website, names are anonymized in decisions "to protect the privacy of the individual and personal or medical information that may be included in the decision."[36] SLASTO claims this is consistent with the *Freedom of Information and Privacy Act.*

While perhaps consistent with *FIPA,* this is certainly not consistent with how cases were cited at FSCO or are cited by the courts. It makes it incredibly difficult for stakeholders to research, reference and properly follow the cases.

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[31] *Ibid* at para 31.
[32] *Stegenga v Economical Mutual Insurance Company,* 2018 ONSC 1512 at para 2, 289 ACWS (3d) 817.
[33] *Rules* at R 18.1.
[34] *Licence Appeal Tribunal Act,* 1999 SO 1999, c 12, s G at s 11(1).
[35] *Mary Shuttleworth v Licence Appeal Tribunal,* 2018 ONSC 3790, 293 ACWS (3d) 835 [*Shuttleworth*].
[36] SLATSO Website, "Frequently Asked Questions: Why are names anonymized in decisions?": https://slasto-tsapno.gov.on.ca/lat-tamp/en/automobile-accident-benefits-service/faqs/.

With FSCO, we had years of established precedent that could be easily researched and relied upon. One of Justice Cunningham's recommendations for the dispute resolution system included that arbitration decisions continue to be published so that they can provide guidance on other disputes. His Honour stated that:

> I believe publishing arbitration decisions makes the DRS more accountable and creates public confidence in the system. Although publishing arbitration decisions does not necessarily make the system more predictive, it does inform users how their issues might be dealt with within the system.
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> …
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> As well, there was some confusion regarding a statement in the interim report suggesting that arbitration decisions would only apply to that individual case. My intent was that arbitration decisions would not be binding on other disputes. However, it is important that similar fact cases should have similar outcomes. For this reason, publicly releasing decisions is necessary.
> The purpose of the DRS is to resolve disputes with respect to the SABS and not create case law. I believe it is contrary to the intent of the DRS to have decisions set precedents, although the decisions will inform stakeholders as to how the SABS might be interpreted.[37]

Without a mechanism to properly research and follow decisions, it is very difficult for stakeholders to stay on top of the ever growing body of precedent. This will have the unintended consequence of increasing the number of disputes and limiting the predictability of decisions.

The Ugly

As if the above is not bad enough, the recent Divisional Court decision in *Mary Shuttleworth v. Licence Appeal Tribunal* highlights a seemingly biased, non-transparent internal review process that should be a concern to all stakeholders.[38] The LAT claimed its internal review process is used to maximize the quality of the tribunal's decisions. While the process is not formalized in a written policy, the LAT claimed it generally contained the following:

> First, there is peer review: After drafting a decision, an adjudicator *is expected to send the decision for peer review by the Duty Vice-Chair.* The Duty Chair offers suggestions to improve clarity, reasoning and readability and might also evaluate, for example, whether the correct legal test has been applied and whether any related case law that was not mentioned might be helpful.

[37] Cunningham Report *supra* note 1, at p 14.
[38] *Shuttleworth supra* note 35.

> Second, there is legal review: The SLASTO Legal Services Unit reviews the decision to ensure that the correct legal test has been applied and to identify any related case law that was not mentioned that might be helpful.
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> Third, there is a second peer review by the executive chair: "In some rare instances – such as when a decision involves a novel, contentious, precedent-setting, or high profile issue – *the Legal Services Unit will send the decision to the Executive chair for her review*. In these instances, the Executive chair serves, in essence, as a second peer reviewer and accordingly will order the same kinds of comments that the author would typically receive during the initial peer review."
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> Fourth, there is a review by the file's case management officer: The case management officer acts as an intake officer and primary point of contact for the parties. This review involves examining the decision's format, correcting grammatical and spelling errors, and ensuring that the template and parties' names are correct. [Emphasis added.][39]

Shuttleworth involved a catastrophic impairment denial. The first level hearing was held before Adjudicator Sapin who determined the Applicant was not catastrophically impaired. Several months after the decision was released, counsel for the Applicant received an anonymous note stating that:

> I have heard from [sic] reliable source that the [adjudicator] Sapin's initial decision was that this was a catastrophic impairment. This decision then went up for review and the [executive chair] Linda Lamoureux changed the decision to make the applicant not catastrophically impaired.
>
> Thought you should know that the decision was not made by an independent decision maker who heard the evidence.
>
> I was also told that [the adjudicator] Sapin hesitated to sign this order.[40]

The Applicant appealed to the Divisional Court for judicial review. The Executive Chair admitted to having reviewed the adjudicator's draft decision and offering her opinion with respect to same. The LAT indicated that this was done because *Shuttleworth* was to be the first catastrophic determination by the LAT.

In reviewing the LAT's internal review process, Justice Thornburn on behalf of the Divisional Court held the absence of a written policy with respect to same to be significant. Sections 7 and 8 of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, contains a formal process to ensure the accountability of the tribunal, specifically:

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[39] *Ibid* at para 25.
[40] *Ibid* at para 33.

Member accountability framework

7 (1) Every adjudicative tribunal shall develop a member accountability framework.

Contents

(2) The member accountability framework must contain,

(a) a description of the functions of the members, the chair and the vice-chairs, if any, of the tribunal;

(b) a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal;

(c) a code of conduct for the members of the tribunal; and

(d) any other matter specified in the regulations or in a directive of the Management Board of Cabinet.

Approval

(3) The member accountability framework must be approved by the tribunal's responsible minister.

Publication, Amendment and Review of Public Accountability Documents

Publication of public accountability documents

8 Every adjudicative tribunal shall make its public accountability documents, approved as required by section 3, 4, 5, 6 or 7, as the case may be, available to the public.[41]

At the time of *Shuttleworth* (and as of the date of this paper), the LAT's internal review process did not comply with these requirements; it was not adopted and published in accordance with the above-noted statutory process. Further and despite assurances from counsel for the LAT in *Shuttleworth* that the process was "voluntary", there was no evidence that specifically indicated same. The evidence instead revealed that decisions were sent to the Executive Chair for review without any agreement or input from the adjudicators.

The Divisional Court was asked to determine whether there was a reasonable apprehension that the adjudicator did not arrive at her decision independently and if so, the appropriate remedy.

[41] *Ibid* at para 25 citing *Adjudicative Tribunals Accountability, Governance and Appointments Act,* 2009 SO 2008, c 33, s 5.

Justice Thorburn held that the existence of an internal review process did not in and of itself create a perception of bias. However, the failure of the LAT to comply with the statutory process did create such a perception. Justice Thornburn stated:

> [61]…Review was imposed by the executive chair; a person at a supervisory level of authority within the administrative hierarchy. Consultation was not requested by the Adjudicator. There was no formal or written policy protecting the adjudicator's right to decline to participate in review by the executive chair or to decline to make changes proposed by the executive chair. In their emails, the adjudicator and executive chair discussed the fact that the changes proposed would take time to draft but the executive chair indicated that the changes were important enough to justify further delay in the finalization of the decision.
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> [62] This failure to comply with the rules for consultation laid out in *Consolidated Bathurst* and applied in *Ellis-Don*, creates a reasonable apprehension of lack of independence.[42]

The adjudicator's decision was therefore set aside and the matter was referred back to the LAT for a new hearing.

It remains to be seen what the LAT will now do with its internal review process. I would expect (and hope) that it will endeavour to comply with its obligations to formalize and make transparent the process. In doing so, the LAT should consider allowing interaction with stakeholders to enable all concerns to be addressed and discussed. I would argue that in addition to being transparent, the Executive Chair (as well as other members in a supervisory position) should be removed from the process and the review should include a provision requiring notice of same to the parties. The review should not be done in secret and the parties should have an opportunity to make further argument or comment if a decision is to be substantively revised.

I would further argue that adjudicators need to be tenured to guarantee independence. FSCO arbitrators and the judiciary were and are tenured. Most LAT adjudicators are in contrast, paid per diem on time limited contracts. Many of them also appear to lack experience with motor vehicle claims and the *SABs.* [43] The lack of tenure and experience makes it difficult for them to remain independent, disregard revisions made by other members, and creates the perception of a lack of independence.

Shuttleworth presents an ugly depiction of the SABs in the post-LAT world. Had the Executive Chair not imposed review upon the adjudicator, Ms. Shuttleworth may have been deemed catastrophically impaired and had access to catastrophic benefits. Instead, she was seemingly

[42] *Ibid* at paras 61-62.
[43] Licence Appeal Tribunal Adjudicators, March 9 2017: http://advocast.ca/assets/pdf/lat2017/4_2%20List%20of%20LAT%20Adjudicators.pdf.

denied same by an Executive Chair who was not privy to the evidence presented during the course of the hearing. Further, and even more concerning, is that had it not been for the anonymous note counsel received, this process would not likely have come to light. This has to cause us to wonder: what else is happening behind the closed SLASTO doors?

The Good?

While the concerns with the LAT certainly outweigh any positives, there have been a few good developments since the LAT took over SABs disputes. These include:

1. The use and availability of written hearings; and
2. Timelier access to the tribunal.

When Justice Cunningham reviewed the dispute resolution system in 2013, he recommended the system provide quick access to dispute resolution services and accommodate different processes based on the complexity of the case. [44]

Under FSCO, the system did neither. Written hearings were very rarely used and several years would often go by between the application to dispute, mediation, pre-hearing, and the ultimate arbitration. There was a significant backlog first at the mediation stage and later at the arbitration stage that FSCO proved unable to address. This backlog created significant barriers to claimants resolving disputes and accessing much needed benefits.

The LAT has proven to be much better than FSCO in this respect. First, the above-noted statistics demonstrate a trend favouring written hearings. While oral testimony is likely preferable in cases involving credibility issues, fraud and larger monetary amounts, written hearings are useful in cases involving purely legal issues, non-contentious facts, and less significant monetary amounts. Written hearings can significantly reduce costs as hefty expert attendance and preparation fees, for example, need not be incurred. Written hearings also free up arbitration dates for other matters, increasing timelier access to the tribunal.

Written hearings can also assist in earlier resolution of claims. When a written hearing is selected, the tribunal will set (and enforce) deadlines for delivery of affidavit and other evidence. This forces the insurer to prepare their materials in advance of arbitration. As a result, I have found that insurers often make efforts to try to resolve the dispute prior to these deadlines to avoid the time and expense of preparing the materials.

Second, the LAT has rules and procedures to prevent unnecessary delay (and unlike with FSCO, it appears to largely follow same). They require:

[44] Cunningham Report *supra* note 1, at p 2.

a) delivery of Response to a Complaint within 14 days of receiving notice of same;[45]
b) delivery of Case Conference Summary at least 10 days prior to the Case Conference;[46] and
c) scheduling arbitration hearings "generally" within 60-90 days of the Case Conference.[47]

Thus far, the LAT has taken serious its mandate to provide timely hearings. When it first took over disputes, it had a very rigid policy with respect to adjournments of both case conferences and hearings, refusing most requests. It has since relaxed its policy somewhat for Case Conferences and will now typically allow short adjournments for reasons including scheduling conflicts.

Case Conference bookings are unilaterally assigned with typically less than 6 weeks' notice. If counsel cannot accommodate the date selected, counsel may file a Request for an Adjournment form citing the scheduling conflict. I have not had any issues as of late with the LAT approving same so long as the adjournment is requested within reason, the request is on consent, and 3 days of alternative dates within 30 days of the originally scheduled Case Conference are provided.[48]

With respect to all other requests for adjournments and more particularly requests to adjourn an arbitration hearing, the LAT has taken a very aggressive stance, more often than not refusing such requests. This is a very nice change from our experience with FSCO where delay seemed to be the norm.

In considering adjournment requests, the LAT relies on s. 21 of the *Statutory Powers Procedure Act* ("*SPPA*") which indicates that:

> A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.[49]

This section has been interpreted to mean that "the central consideration on a motion for an adjournment is whether or not it will permit an adequate or full and fair hearing of the matter and assist the adjudicator to make a decision based on the merits of the case."[50]

In addressing adjournment requests, the LAT has made clear that it matters not whether the:

- request is on consent;

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[45] *Rules* at R 20.2.
[46] *Rules* at R 20.4.
[47] SLATSO Website, "Frequently Asked Questions: When and how is the hearing held?": https://slasto-tsapno.gov.on.ca/lat-tamp/en/automobile-accident-benefits-service/faqs/.
[48] *Rules* at R 16.1.
[49] *Statutory Powers Procedure Act*, RSO 1990 c S 22, s 21.
[50] *17-002468 v Northbridge Insurance Company*, 2017 CanLII 63621 at para 16.

- dates booked do not work for one of the parties; or
- further productions are required.

In *17-0055397 v. Unica Insurance Inc*., Adjudicator Ferguson refused the Respondent's request for an adjournment despite the Applicant's consent.[51] The Case Conference Order did not specify a deadline for production and as the hearing drew near, they remained outstanding. The Respondent sought an adjournment of the hearing as a result of same. Adjudicator Ferguson set timelines for productions, but refused the adjournment request indicating that:

> My mandate under Rule 3.1 [of the Rules] includes ensuring timely proceedings and my assessment is that the failure to produce outstanding documents will not unduly prejudice the Respondent's case: it can argue effectively that the missing documents undermine the Applicant's appeal and that the onus on her to prove her entitlements is not met without the missing requested evidence.[52]

In addition to restricting adjournments, the LAT has also been aggressive in scheduling timely hearings near and/or within the 60 to 90 day post Case Conference target. At a Case Conference in late May, one of my colleagues sought to have the hearing scheduled in November. She was advised by the adjudicator that his "calendar did not go beyond September" and required to book the hearing in or prior thereto. While the adjudicator's ruling was not helpful in my colleague's case due to scheduling issues, it is overall one of the big positives of the LAT. Our clients are no longer forced to wait years for a hearing date or endure insurer delay tactics as they were under the FSCO process.

In looking to the future, however, one must question whether or not the LAT can maintain its current timeliness. In the first quarter of 2017-2018, SLASTO Open Data[53] indicates that:

- the LAT received 2282 applications;
- 876 files closed before the case conference;
- 1320 case conferences were held;
- 234 case conference continuations were held;
- 114 hearings were held;
- 15 hearing continuations were held; and
- 48 decisions were issued.

There is currently an active case load of 2253 cases. This is not much of a reduction from what existed at the beginning of the quarter, creating a realistic fear the LAT will not be able to keep up with the volume of disputes.

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[51] *17-005397/AABS v Unica Insurance Inc,* 2018 CanLII 8094.
[52] *Ibid* at para 18.
[53] SLATSO Website, "Open Data Inventory: Operational Statistics", https://slasto-tsapno.gov.on.ca/en/about-us/governance-accountability/.

The trend unfortunately appears to be leaning in this direction. As an example, I recently filed an Application to Dispute on July 20, 2018. As of August 28, 2018, the LAT had still not addressed the Application or sent out a request for a Response to the Insurer. When we contacted the LAT to question the delay, it advised that it "*has an extremely high volume of applications at this time and has not yet assigned the application to a Case Management Officer*". Similarly, we are noticing lengthier wait times for Case Conferences, averaging about 4 months from the submission of the Application. Only time will tell if the LAT will fall into the same backlog and delay trap that FSCO did.

Best Practices: How to Cope with this New Reality?

The LAT and its current Rules are unfortunately here to stay; at least for the immediate future. This does not, however, mean our clients are doomed. There are strategies we can use to increase our client's chances of success. These include:

1. **Getting our ducks in a row before commencing an Application to Dispute:**

   With the fast pace at which the LAT moves from application to hearing, it is important to have all of your client's medical reports and evidence ready at the commencement of the dispute resolution process. There is not usually sufficient time to obtain further reports after the application is commenced. Further, getting our ducks in a row early will also increase the likelihood of settlement. The more prepared we are, the more likely the insurer will take the claim seriously at Case Conference.

2. **Choose your battles wisely:**

   Not every denial or partial approval is worth bringing to the LAT, particularly with the unavailability of costs. I often wait and "collect" disputes to use together, such as multiple medical rehabilitation denials, rather than disputing each individually. This can be done without jeopardizing the client's treatment needs if the client has the financial resources to fund the treatment, a loan is used, or the treatment provider agrees to treat in exchange for a direction to be paid out of the lawsuit. Also, there is no point to bringing the dispute if the client will otherwise exhaust his or her medical rehabilitation limits.

3. **Be smart about the costs incurred:**

   With the unavailability of costs, we need to think more strategically. For example, obtain the medical reports that support your strongest argument instead of obtaining reports on all issues. The MIG is a good example of this. If the client's best shot at being removed from

the MIG is a predominantly psychological injury, get a psychological report. Do not waste time and resources on other reports. This will streamline the hearing and keep costs down.

4. **Where it makes sense, opt for written hearings:**

   Not all matters require in-person hearings. With effective written advocacy, we can be successful at written hearings and at the same time, keep the costs down. The other benefit of written hearings is adjudicators set deadlines for production of evidence. We can use these deadlines to our advantage to keep the pressure on the insurer and elicit settlement discussions.

5. **Trigger bad behavior *after* issuing the dispute:**

   Do not stay silent when an insurer's bad behavior may create cost entitlement. Paper the file and use case conference resumptions to make issues known to the tribunal. The only way to get costs (however minimal) is by building your case for same throughout the proceeding.

6. **Where possible, consider and negotiate an Agreed Statement of Facts:**

   Agreed statements of fact can be used to focus and streamline the hearing. I recently negotiated one on a MIG dispute where the insurer agreed that my client suffered psychological injuries. The only real dispute was whether or not my client was entitled to be removed from the MIG for both of her SABs claims, or only one. The agreed statement of fact proved very useful in keeping costs low and focusing the parties on the real issues in dispute.

7. **Use Case Conference resumptions to your advantage:**

   In addition to helping to justify cost awards, the resumption can also be used to keep the pressure on the insurer. If the insurer delays in producing documents or fails to comply with a tribunal order, request a resumption. Resumptions are also useful to elicit settlement discussion.

8. **Don't Assume the Adjudicator Knows the Law:**

   As noted above, many adjudicators do not have experience with motor vehicle cases or the SABs. Assume (as we previously would have with the judiciary) that the adjudicator does not know the law and present clear and reasoned legal analysis supporting your position. Review the medical rehabilitation jurisprudence about what is reasonable and necessary, review the IRB jurisprudence about what qualifies for post 104-week benefits, and so forth. The more the law is clarified in your client's favour, the more likely your client is to succeed.

9. **Be prepared and be prepared EARLY:**

   While this is a repeat of number 1 above, this cannot be emphasized enough. Gone are the days where we can wait until after mediation to build our cases. We now need to have our cases built and ready to go at the commencement stage.

The LAT is a whole new world. Despite its challenges, however, our clients are not doomed. We can use the LAT process to our advantage by being prepared early and adapting our strategies to accommodate the numerous challenges this new world presents.